INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
40th session
Agenda item 3

FUND/EXC.40/3
10 October 1994

Original: ENGLISH

INCIDENTS INVOLVING THE IOPC FUND

RIO ORINOCO

Note by the Director

1 The Incident

1.1 The asphalt carrier RIO ORINOCO (5 999 GRT), registered in the Cayman Islands, experienced problems with her main engine whilst en route from Curaçao to Montreal with approximately 9 000 tonnes of heated asphalt cargo and about 300 tonnes of intermediate fuel oil and heavy diesel oil on board. While repairs were being effected in the Gulf of St Lawrence, the ship dragged her anchor in heavy weather and grounded on the south coast of Anticosti Island on 16 October 1990. An estimated 185 tonnes of the intermediate fuel oil was spilled and came ashore east of the grounding position. About ten kilometres of the coastline were heavily polluted, and small patches were spread over a further 30 kilometres. No asphalt cargo was spilled. During subsequent weeks the cargo cooled and a significant part became solid.

1.2 The weather deteriorated and the disabled ship refloated, finally coming to rest wedged between two rock shelves. The RIO ORINOCO was declared a constructive total loss by the hull insurer on 18 November 1990, and the Canadian Coast Guard then assumed control of the ship. Renewed attempts to refloat the vessel were made by the Canadian Coast Guard in December 1990, but these attempts also failed. After extensive preparations, the ship was finally refloated on 7 August 1991 and taken to Sept Iles.

1.3 The RIO ORINOCO was entered with Sveriges Ångfartygs Assurans Förening (the "Swedish Club") in respect of both hull and P & I insurance.

1.4 The limitation amount applicable to the RIO ORINOCO was fixed by the Canadian Court at Can$1 182 617 (£595 000). The limitation fund was constituted by the Swedish Club by means of a letter of guarantee.

2 Clean-up Operations

2.1 The Canadian Coast Guard made attempts to collect oil at sea but with little success in the difficult sea conditions.

2.2 On-shore clean-up operations on Anticosti island were carried out during the period up to 10 November 1990 by contractors on behalf of the shipowner. The operations were terminated for the winter on that date, due to deteriorating weather conditions. By then most of the beaches had been cleaned, and the environmental impact is believed to have been minimal. Some further clean-up was carried out in July 1991.

3 Removal of the RIO ORINOCO, her Bunkers and Cargo

3.1 The Coast Guard decided that the remaining bunkers (some 115 tonnes) should be removed, and this operation was carried out in December 1990. After having discussed the various options for removing the ship with the Swedish Club and the IOPC Fund, the Coast Guard decided to try to refloat the vessel. Due to unusually bad weather, however, it was decided on 21 December 1990 to call off any attempt to remove the vessel until the spring of 1991.

3.2 A Canadian contractor (Groupe Desgagnés) was given the task of removing the vessel under a contract concluded with the Canadian Government. Groupe Desgagnés should, against a lump sum, remove the RIO ORINOCO from her grounded position and take her to a place of safety. The method to be used would consist of removing part of the asphalt cargo so as to facilitate the refloating of the vessel. The contract was based on a "no cure, no pay" formula. Between 23 July and 5 August 1991, some 2 300 tonnes of asphalt were removed. The RIO ORINOCO was refloated on 7 August, and was then towed to Sept Iles. No spill of bunker oil or asphalt occurred during the refloating or during the towing operation.

4 Claims Settlements

4.1 The Canadian Government submitted claims relating to the operations carried out by or on behalf of the Canadian Coast Guard as well as the operations carried out by the Ministry of Environment and the Ministry of Fisheries and Oceans. These claims were approved by the IOPC Fund for a total amount of Can$11 791 848 (£5 645 200). The IOPC Fund paid the settlement amount in instalments in November 1991, February 1992 and June 1992.

4.2 The Swedish Club had paid various contractors who carried out clean-up operations and waste disposal. It should be noted that by having set up the limitation fund the Club had fulfilled its obligations under the Civil Liability Convention (cf Articles VI.1 and VIII.8). The Swedish Club submitted subrogated claims in respect of the cost of clean-up and waste disposal. These claims were settled at Can$2 222 661 (£979 150) by the IOPC Fund. After making a reduction to take account of the limitation amount (Can$1 182 617), the IOPC Fund paid a total amount of Can$1 040 044 (£458 635) in respect of these claims.

4.3 Indemnification of the shipowner in the amount of Can$295 654 (£148 800) has not yet been paid as the limitation proceedings have not been completed.

5 Investigation into the Cause of the Incident

5.1 The Transport Safety Board of Canada has carried out an investigation into the cause of the incident.

5.2 Under the applicable Canadian legislation, the authority carrying out the investigations should, before making the report public, on a confidential basis, send a copy of the draft report on its findings to any person who is considered to have a direct interest in its findings. The IOPC Fund requested that the Canadian authorities should give the Fund access to the draft report. The Canadian authorities did not consider that the IOPC Fund had a direct interest in the findings, however, and the Fund's request was therefore rejected.

5.3 The Report of the Transport Safety Board, dated 25 November 1993, was made available to the IOPC Fund in the middle of January 1994. The Director has made an in-depth examination of this report with the assistance of legal and technical experts.

5.4 The Transport Safety Board Report states that the RIO ORINOCO grounded after dragging her anchors following a main engine failure. From the findings in the Report, it appears that the underlying cause of the incident was the unseaworthiness of the ship at the commencement of the voyage both as regards the equipment and its maintenance/state of repair, and as regards the crew manning the vessel. In a communiqué from the Transport Safety Board dated 30 December 1993, the RIO ORINOCO is referred to as a substandard ship.

5.5 In the Report it is stated that the vessel's machinery was continually undergoing repairs. It is also mentioned that, due to frequent varied and serious malfunctions and breakdowns, planned maintenance could not be undertaken. It is noted that the RIO ORINOCO had proceeded to the anchorage near Anticosti Island in order to repair the main engine, which had failed several times as a result of the use of heavily contaminated fuel. It is pointed out that the ship had experienced serious and continuing fuel contamination and machinery breakdowns during her two previous voyages. According to the Report, only one of the three generators was fully operational upon departure from Curaçao, and the fuel oil was not always treated before use. The Report also states that the condition of the engine room machinery was not brought to the attention of the classification society ("Det Norske Veritas") and that the cumulative effect of the deficiencies was such that it would have called into question the seaworthiness of the ship.

5.6 The Report criticises the qualifications of the crew. It is stated that the master, the chief officer and the chief engineer did not hold the required Cayman Islands' certification, that the ship did not carry the appropriate number of qualified engineers and that there was no certified radar officer on board. It is also mentioned that the engine room crew were subjected to long hours of physically demanding work in uncomfortable conditions. According to the Report, the constant need for repair of the machinery increased the stress on the crew. The Report expresses the view that these factors together degraded the performance of the crew and compromised safety.

5.7 The Report notes that the principal members of the management team were part-owners of one or more vessels operated by the management company. It is also stated that the vessel's managers were aware of the condition of the vessel with respect to both machinery and manning.

6 Legal Action taken by the IOPC Fund

6.1 On 15 October 1993, as a precautionary measure, the IOPC Fund brought legal action in the competent Federal Court of Canada against the owner of the RIO ORINOCO (Rio Number One Ltd) and the company which managed the vessel (Horizon Management Corp. Inc). In the statement filed with the Court, the IOPC Fund requested that the defendants be ordered to pay, jointly and severally, to the IOPC Fund the sum of Can$12 831 892 (viz the aggregate of the amounts paid by the Fund to the Canadian Government and the Swedish Club), plus interest thereon. The IOPC Fund maintained that the incident was due to the fault or privity of the shipowner and argued that the owner was not entitled to limit his liability. Action has also been taken against the Swedish Club as guarantor of the shipowner's liability.

6.2 In the light of the findings of the Transport Safety Board, the Director takes the view that the ship was not seaworthy at the time of the grounding and that the incident was due to this

unseaworthiness. The findings indicate, in the Director's view, that the shipowner must have been aware of the condition of the ship and the lack of qualifications of the crew. For this reason, the IOPC Fund has maintained in its pleadings to the Court that the incident occurred as a result of the actual fault or privity of the shipowner and that the latter is not entitled to limit his liability (Article V.2 of the Civil Liability Convention).

6.3 Under Canadian law, these actions should in principle be served on the defendants within 12 months of the action being brought, viz by 15 October 1994. The Court has granted a request by the IOPC Fund, however, to extend this period of service to 15 September 1995.

7 Consideration by the Executive Committee at its 38th and 39th sessions

7.1 At its 38th session, the Executive Committee held a session in private to discuss the Report of the Transportation Safety Board. During this closed session only the delegations representing Fund Member States were present.

7.2 The Executive Committee took note of the fact that on 15 October 1993 the IOPC Fund had taken legal action in the competent Canadian court against the owner of the RIO ORINOCO, the management company and the shipowner's P & I insurer. The Committee discussed what measures should be taken by the IOPC Fund, in the light of the findings set out in the Report of the Transportation Safety Board. The Committee instructed the Director to carry out an in-depth examination of the Report, with the assistance of legal and technical experts. In addition, the Committee instructed the Director to continue his investigations into the financial circumstances of the shipowner and the management company, in order to ascertain whether there would be any financial advantage in pursuing the legal action taken against them by the IOPC Fund. The Director was also instructed to consider whether the IOPC Fund should take any other legal action, including recourse action. Finally, the Director was instructed to examine whether or not, in the light of the findings in the Report, the shipowner's insurer should be entitled to indemnification under Article 5 of the Fund Convention.

7.3 The Executive Committee reconsidered the issues set out above at its 39th session. The Committee noted that since its 38th session, the Director had, with the assistance of the IOPC Fund's legal and technical experts, pursued his study of the matters referred to in the Committee's instructions. In view of the fact that the Director did not consider that he was yet in a position to make recommendations to the Committee on these matters, the Committee decided to defer further examination of these issues to its 40th session and instructed the Director to pursue his study.

7.4 In view of the possibility that certain measures might have had to be taken by the IOPC Fund before the 40th session of the Executive Committee in order to protect the interests of the Fund in relation to the issues referred to in paragraph 7.2 above, the Committee authorised the Director to take any steps which he considered necessary in order so to do.

8 The Director's Analysis of the Situation

8.1 The Factual Situation

8.1.1 The shipowner, viz Rio Number One Ltd, was registered in the Cayman Islands. The company was struck from the Companies' Register on 31 March 1992. The registered shareholders of the other companies within the group (Numbers Two to Six) are all nominee shareholders, so that the names of the real shareholders do not appear. The company managing the Rio Orinoco, Horizon Management Corp Inc, registered in Florida (United States), has ceased operations and was involuntarily dissolved on 13 August 1993, for failure to file an annual report.

8.1.2 The IOPC Fund has filed a petition to the competent court in the Cayman Islands to have Rio Number One Ltd reinstated in the company register, so as to enable the IOPC Fund to serve the writ

in the Canadian court action on the company. Such service must be made by 15 September 1995. It is expected that the Cayman Islands Court will grant the IOPC Fund's request. Should the Executive Committee decide that the IOPC Fund should pursue the issue, a motion for reinstatement will be presented in the near future.

8.1.3 The IOPC Fund will, in the middle of October 1994, through a lawyer in Florida bring legal action in the United States Federal District Court in Florida against the shipowner and the company managing the Rio Orinoco. The period for taking such action is four years from the date of the incident. If this action is to be pursued, the action must be served on those companies within 120 days of filing the action. Before serving the action, the IOPC Fund will have to have the management company reinstated.

8.1.4 The IOPC Fund's lawyers have investigated the financial position of Rio Number One Ltd and Horizon Management Corp Inc. It appears that there are no assets against which judgements against these two companies could be executed.

8.1.5 The IOPC Fund has also investigated the financial position of the four principal individuals who were members of the boards, officers and shareholders of the two above-mentioned companies. The IOPC Fund's lawyers have not been able to trace all of them. Two of them appear to be domiciled in Sweden, and they seem to have some assets, but not of the magnitude which would be required for the satisfaction of the IOPC Fund's recovery claim. The four individuals have been named as defendants in the Canadian Court action and must be served within the same period as the two companies. The IOPC Fund has argued that these individuals are liable by virtue of the doctrine of piercing the corporate veil.

8.2 The Legal Situation

8.2.1 On the basis of legal advice received, the Director takes the view that it is practically certain that the Canadian courts would not allow the shipowner (Rio Number One Ltd) to limit its liability.

8.2.2 If this assessment of the situation is correct, Rio Number One Ltd would be liable for the aggregate amount of the pollution damage resulting from the incident. After having obtained judgement in the Canadian Court, the IOPC Fund could proceed to the Cayman Islands and have the company placed in liquidation. As set out above, however, it is very unlikely that there would be any assets against which a judgement against that company could be enforced.

8.2.3 As for the management company, Horizon Management Corp Inc, it might be possible to obtain a judgement in Florida establishing the liability of this company outside the Civil Liability Convention, on the basis of negligence, but this is far from certain. In any case, it is unlikely that there would be any assets against which such a judgement could be enforced.

8.2.4 The Director has also considered whether action should be brought in Florida against the individual directors of Rio Number One Ltd and of the management company. Such action should be brought within four years of the date of the incident. Under Florida law, a director is held to a statutory duty of care and is thus personally liable for damages to any person caused by the director's act or omission in breach of this statutory duty of care, if such breach constitutes reckless activity or an act or omission committed in bad faith or maliciously, or in a manner exhibiting wanton and wilful disregard of human rights, safety or property. In any case, the investigations into the personal financial situation of the directors has led to the conclusion that it is unlikely that there would be any significant assets against which judgements against the directors could be enforced. However, as a precautionary measure, these individuals will be added as defendants in the court action in Florida.

8.2.5 The Director has also examined whether the IOPC Fund should take legal action against the classification society ("Det Norske Veritas") on the basis of negligence. In the Director's view, there is not sufficient evidence that the classification society has in fact been negligent. It is stated in the Report of the Transport Safety Board of Canada (page 18) that the classification society was not informed of the engine room problems. An action against Det Norske Veritas would have to be

brought in the Province of Quebec (Canada) or in Norway. As regards the Province of Quebec, the time bar period for such action at the time of the incident was two years, and under Norwegian law it is three years. This means that any action against the classification society is time-barred. It should be noted that it was virtually impossible for the IOPC Fund to take legal action against third parties until it had access to the Report of the Transport Safety Board in January 1994, ie more than three years after the incident.

8.2.6 In the light of the considerations set out above, the only possible source of recovery would, in the Director's view, be the insurers of the RIO ORINOCO, ie the Swedish Club. If the IOPC Fund were to seek recovery from the Swedish Club, several difficult legal questions would arise.

8.2.7 As set out above, the Swedish Club has constituted a limitation fund in the competent Canadian court for the amount applicable to the vessel in accordance with Article V.1 of the Civil Liability Convention (Can$1 182 617, corresponding to £595 000). Under the second sentence of Article VII.8 of that Convention, the insurer may, irrespective of the fault or privity of the shipowner, avail himself of the right of liability prescribed in Article V.1. Consequently, there would be no right of direct action under Article VII.1, first sentence, for an amount in excess of the above-mentioned limit of liability. The Swedish Club has been joined in the Canadian Court action in its capacity of guarantor.

8.2.8 Another possibility would be to get a judgement against the shipowner, possibly by default, and on the basis of that judgement pursue an action against the Swedish Club in Canada or in Sweden invoking the insurance cover, in view of the fact that the shipowner has no assets and in fact no longer exists. The IOPC Fund would have to obtain an assignment of rights under the insurance contract from the liquidator of Rio Number One Ltd in the proceedings in the Cayman Islands. However, the Swedish Club Rules which form part of the contract between the Swedish Club and the shipowner contain the so-called "pay to be paid clause", ie the Club is under obligation to indemnify the shipowner only for compensation actually paid to the injured party[<1>]. The same clause is contained in the Rules of all the major P&I Clubs. For this reason, the Swedish Club would certainly maintain that the IOPC Fund is not entitled to any recovery from the Club, since the owner has not made any payment to victims.

8.2.9 The question is whether the "pay to be paid" rule would be upheld by the Canadian courts. In the United Kingdom, the House of Lords has in two recent cases (*Fanti* and *Padre Island*) upheld this rule.

8.2.10 This issue has been examined in depth by the IOPC Fund's Canadian lawyer, who has been handling this case for the IOPC Fund from the outset. In view of the importance of the matter, a second opinion has been obtained from another Canadian maritime lawyer. Both lawyers have expressed the view that it is probable that the "pay to be paid" rule would be upheld by the Canadian courts if a direct action were pursued against the Swedish Club in Canada under Canadian maritime law.

8.2.11 Although there is no federal statute in Canada providing for direct action, an "oblique action" procedure exists in the Provincial Superior Court of Quebec whereby a creditor (the IOPC Fund) may exercise the rights of the debtor (the shipowner) in the debtor's name, where the debtor neglects or refuses to exercise such rights to the prejudice of the creditor (Articles 1627-1630 of the Civil Code of Quebec). The oblique action has been acknowledged by the Quebec Court of Appeal as affording the possibility of gaining access to liability insurance proceeds. However, this action has never been used in maritime matters. It is almost certain that the Quebec Courts would not exercise jurisdiction over a foreign insurer who has no place of business in Canada. Even if the Quebec Courts were to exercise jurisdiction, it should be noted that the oblique action is only a procedural technique empowering a creditor to act in the place of his debtor in order to obtain a sum of money owed to

---

<1> Rule 2.3 reads: "Unless the Association otherwise decides the member is only covered in respect of such sums as he has paid to discharge liabilities, costs or expenses referred to in Chapter II".

the debtor. Under Article 1629 of the Civil Code of Quebec, the Swedish Club would be able to avail itself of the same defences in an oblique action as it would have against the debtor.

8.2.11 If the IOPC Fund were to take an oblique action, the Swedish Club may invoke Rule 18 of the Club Rules which states that disputes arising out of the contract of insurance shall be decided by a Swedish average adjuster or, at the request of either party, be referred to arbitration in Gothenburg in accordance with Swedish law. The Director has been advised that the Canadian Courts will not accept this clause as excluding Canadian jurisdiction.

8.2.12 The Swedish Club could, however, in an oblique action also invoke as a defence the "pay to be paid" provision in the Club Rules. The Director has been advised that the Canadian Courts would, if an oblique action were taken, interpret the "pay to be paid" provision in the Club Rules in accordance with Swedish law, as this is the law applicable pursuant to the Club Rules. The content of Swedish law would therefore be decisive in the context of an oblique action in Canada. There is also the possibility for the IOPC Fund of taking legal action against the Swedish Club in Sweden outside the Civil Liability Convention on the basis of Swedish insurance law. The period for bringing such action in Sweden is ten years. In the view of the Director, it would be preferable, in the circumstances, for the IOPC Fund to take legal action in Sweden, since the Swedish Courts would be better placed to apply Swedish law.

8.2.13 The relevant Swedish law is contained in the Swedish Insurance Contracts Act, Section 95, first and third paragraphs, which read as follows:

> "The insured is not entitled to collect indemnity under the contract of insurance for more than the amount he has paid to the injured party, or the amount for which the injured party has given his consent.
>
> If an insured who is declared bankrupt has a claim on the insurer for an indemnity which he may not collect without the consent of the injured party, the latter shall be entitled, if the administrator of the bankrupt's estate does not pay him such indemnity, to have the claim of the insured against the insurer assigned to him, and the administrator is bound in such a case to make available to him all documents concerning the insurance in the possession of the bankrupt's estate to the extent required for collecting the amount due."

8.2.14 The third paragraph of Section 95 of the Swedish Insurance Act thus sets aside the "pay to be paid" rule in bankruptcy situations[2]. It should be noted, however, that if a stipulation in an insurance contract is at variance with a provision in the Act, this does not prevent the application of the stipulation, except where the Act prohibits such application (Section 3 of that Act). The "pay to be paid" rule is obviously such a stipulation. In one authoritative commentary to the Act it is stated that the third paragraph of Section 95 is permissive (ie not mandatory). A committee which recently presented a proposal for a new Swedish Insurance Act also took the view that this provision is permissive. On the other hand, in a case decided in 1954 the Norwegian Supreme Court took the position that the corresponding provision in the Norwegian Insurance Act is mandatory in a bankruptcy situation. In the light of the tendency in Swedish jurisprudence and legislation in recent years to place increased emphasis on the need to protect the injured party, it is possible that the Swedish Courts would take the same position as the Norwegian Supreme Court, but this is by no means certain.

8.2.15 In view of the analysis set out above, the Director considers that it is uncertain whether in the case of the RIO ORINOCO the Swedish Courts would consider the relevant provision of the Swedish Insurance Act as mandatory, thereby setting aside the "pay to be paid" rule in the Swedish Club Rules. For this reason, the Director is not in favour of pursuing an oblique action in Canada against the Swedish Club, nor of taking action against the Swedish Club in Sweden.

---

[2] Although Rio Number One Ltd would not be technically bankrupt, since under Cayman Islands law corporate bodies can be placed in liquidation only, it is assumed that the Swedish Court would consider the company as bankrupt for the purpose of this question.

8.2.16 On the basis of the considerations set out above, the Director takes the view that the IOPC Fund should not pursue any legal action for the purpose of recovering the amounts paid by it in compensation.

9 Indemnification of the Shipowner

9.1 Under Article 5.1 of the Fund Convention, the IOPC Fund shall indemnify the shipowner or his insurer for a portion of his liability under the Civil Liability Convention. In the RIO ORINOCO case that portion would be 25% of the limitation amount, viz Can$295 654 (£148 800).

9.2 The IOPC Fund is not obliged to pay indemnification to the shipowner or his insurer if the pollution damage resulted from the wilful misconduct of the owner himself (Article 5.1). The IOPC Fund may be exonerated, wholly or partially, from its obligation to pay indemnification if the Fund proves that, as a result of the actual fault of privity of the owner, the ship did not comply with the requirements of certain international instruments and that the incident or damage was wholly or partially caused by such non-compliance (Article 5.3). The instruments in question are (cf document FUND.A/17/28, paragraph 6):

(i) the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78);

(ii) the International Convention for the Safety of Life at Sea, 1974, as modified by the Protocol of 1978 relating thereto (SOLAS 74/78);

(iii) the International Convention on Load Lines, 1966; and

(iv) the Convention on the International Regulations for Preventing Collisions at Sea, 1972.

9.3 The Director considers that the IOPC Fund cannot prove that the pollution damage resulted from the wilful misconduct of the shipowner himself. In his view, the Fund would not therefore be able to invoke Article 5.1 as a ground for refusing to pay indemnification.

9.4 The Director has examined, with the assistance of technical experts and on the basis of the Report of the Transport Safety Board, whether at the time of the incident the RIO ORINOCO did not comply with the requirements of the above-mentioned instruments. He has been advised that there is no evidence to suggest that the ship did not comply with the requirements of MARPOL 73/78, the 1966 Convention on Load Lines or the 1972 Collision Regulations.

9.5 As set out above, the Report of the Transport Safety Board mentions that the condition of the engine room machinery was not brought to the attention of the classification society and that the cumulative effect of the deficiencies were such that it would have called into question the seaworthiness of the ship. The Report also questions whether the crew were qualified (paragraphs 5.4-5.6 above).

9.6 There is no evidence to suggest that the RIO ORINOCO did not comply with the requirements of SOLAS 74 in respect of its construction or equipment. There are, however, two regulations of SOLAS 74 which may be relevant to the cause of the incident, viz Chapter I, Regulation 11 relating to maintenance conditions after survey and Chapter V, Regulation 13, relating to manning. These provisions are reproduced at the Annex to the present document.

9.7 The Report states that the RIO ORINOCO was not manned by the required number of qualified seafarers. The question is whether this fact constitutes the ship's non-compliance with the requirements of SOLAS 74, since that Convention does not contain any specific requirement for the

crew required for safe manning. There is no evidence that the absence of a radio officer on board was a factor contributing to the incident.

9.8 As stated above, the master and the officers did not hold the appropriate Cayman Island's certificates. This constitutes a non-compliance with the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers which is not included in the list of instruments set out in Article 5.3 of the Fund Convention. This non-compliance appears, therefore, not to be directly relevant for the purpose of determining whether indemnification should be paid.

9.9 As for Chapter I, Regulation 11 of SOLAS 74/78, the question is whether a failure to maintain the ship and its equipment was a cause of the incident and, if so, whether and to what extent this should lead to the IOPC Fund being exonerated from its obligation to pay indemnification to the insurer in this case. The following parts of the report of the Transport Safety Board may be relevant in this regard.

- Observations made by the engineering staff and those made during the investigation indicate that the vessel's machinery was in a constant state of repairs and necessitated watchkeepers to remain in the machinery space. As the main engine and auxiliary machinery, due to frequent varied and serious malfunctions/breakdowns, were maintained operable as each crisis arose, planned maintenance could not be undertaken. (Section 1.13)

- The condition of the engine-room machinery was not brought to the attention of DNV. Thus, the Class records indicated that the vessel met the DNV Class requirements and the vessel was considered to have been in Class at the time of the occurrence, although this condition was prevalent from the previous voyage. Despite this, no known declarations or requests for exemption were made.

  Further, the vessel was operated in that condition without either:

  (a) the repairs being effected; or

  (b) precautionary safety measures being taken to ensure that the vessel had sufficient compressed air capacity to meet the manoeuvring needs.

  The cumulative effect was such that it would have called into question the seaworthiness of the vessel and rendered the "RIO ORINOCO" unsatisfactory with respect to international, flag state, and classification society rules governing the operational fitness of the vessel. (Section 2.4)

- The "RIO ORINOCO" grounded after dragging anchor as the result of main engine failure and the inability of the vessel's crew to restart the engine in order to halt the drag of the anchors. (Section 3.2)

9.10 In the Director's view the sections of the report quoted above may provide grounds for maintaining that the ship was not fit to proceed to sea without danger to the ship and that the ship therefore did not comply with Chapter I, Regulation 11 of SOLAS 74/78.

9.11 The Executive Committee is invited to consider whether, in the light of the facts set out in paragraphs 9.4-9.10, the IOPC Fund should be considered exonerated, pursuant to Article 5.3, from its obligation to pay indemnification to the shipowner and his insurer.

10 Action to be taken by the Executive Committee

The Executive Committee is invited to:

(a) take note of the information contained in this document; and

(b) decide whether the IOPC Fund should pursue legal action to recover the amount of compensation paid by the Fund against:

(i) the shipowner;

(ii) the company managing the RIO ORINOCO;

(iii) the directors of the shipowner and the management company; and

(iv) the Swedish Club; and

(c) decide whether and, if so, to what extent the IOPC Fund is exonerated from its obligation under Article 5.1 of the Fund Convention to indemnify the shipowner and his insurer for a portion of the limitation amount prescribed in Article V.1 of the Civil Liability Convention.

* * *

ANNEX

EXTRACT FROM THE 1971 SOLAS CONVENTION

Regulation 11 of Chapter I

Maintenance of conditions after survey

(a) The condition of the ship and its equipment shall be maintained to conform with the provisions of the present regulations to ensure that the ship in all respects will remain fit to proceed to sea without danger to the ship or persons on board.

(b) After any survey of the ship under regulations 6, 7, 8, 9 or 10 of this chapter has been completed, no change shall be made in the structural arrangement, machinery, equipment and other items covered by the survey, without the sanction of the Administration.

(c) Whenever an accident occurs to a ship or a defect is discovered, either of which affects the safety of the ship or the efficiency or completeness of its life-saving appliances or other equipment, the master or owner of the ship shall report at the earliest opportunity to the Administration, the nominated surveyor or recognized organization responsible for issuing the relevant certificate, who shall cause investigations to be initiated to determine whether a survey, as required by regulations 6, 7, 8, 9 or 10 of this chapter, is necessary. If the ship is in a port of another Party, the master or owner shall also report immediately to the appropriate authorities of the port State and the nominated surveyor or recognized organization shall ascertain that such a report has been made.

Regulation 13 of Chapter V

Manning

(a) The Contracting Governments undertake, each for its national ships, to maintain, or, if it is necessary, to adopt, measures for the purpose of ensuring that, from the point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned.

(b) Every ship to which chapter I of this Convention applies shall be provided with an appropriate safe manning document or equivalent issued by the Administration as evidence of the minimum safe manning considered necessary to comply with the provisions of paragraph (a)[<1>].

<1> Paragraph (b) was added by the Amendments adopted in 1988 by the Maritime Safety Committee of IMO through Resolution MSC 12(56). These Amendments entered into force on 29 April 1990. The IOPC Fund Assembly decided at its 12th session not to include these amendments in the list of instruments contained in Article 5.3 of the Fund's Convention and therefore the provisions of paragraph (b) are not relevant for the purpose of Article 5 of the Fund Convention.